

**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

32168

**FILE:** B-219317.4

**DATE:** September 9<sup>th</sup>, 1985

**MATTER OF:** J.G.B. Enterprises, Inc.--Reconsideration

**DIGEST:**

Prior decision dismissing protest against the rejection of a bid on a total small business set-aside due to the protester's representation in the bid that all supplies to be furnished would not be products of domestic small business is affirmed, since the protester has not shown that the decision is erroneous as a matter of fact or law.

J.G.B. Enterprises, Inc. (JGB), requests reconsideration of our decision, J.G.B. Enterprises, Inc., B-219317.2, July 31, 1985, 85-2 C.P.D. ¶ \_\_\_\_, dismissing its protest concerning the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DLA700-85-B-0364, issued by the Defense Logistics Agency (DLA) as a total small business set-aside for hose assemblies. We affirm the dismissal.

JGB had checked the box in its bid indicating that it was a small business concern, listed its own plant as the place of performance, and indicated in the Walsh-Healey certification that it was a manufacturer of the supplies to be furnished under the contract, but also had checked the box indicating that not all supplies to be furnished would be manufactured or produced by a domestic small business concern. DLA rejected the bid as nonresponsive on the ground that JGB had not clearly obligated itself to furnish products produced by a small business.

JGB protested the rejection of its bid, contending that the certification that it was a small business together with the listing of its own plant as the place of performance and the Walsh-Healey certification that it was a manufacturer created a binding obligation to furnish supplies manufactured by a small business. JGB maintained that the allegedly inadvertent certification that not all supplies would be produced by a small business was a correctable error.

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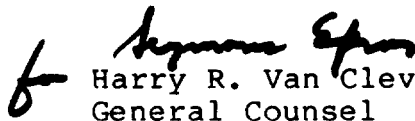
We rejected JGB's arguments. We first noted that certifying that not all items furnished under a small business set-aside contract will be manufactured by a small business represents a failure to make a mandatory performance commitment and thus renders the bid nonresponsive and not subject to correction. Second, we held that even if the small business, Walsh-Healey and place of performance clauses were viewed as indicating an intention to furnish small business products, the express contrary certification that the supplies furnished would not all be manufactured by a small business rendered the bid ambiguous on this point and thus nonresponsive.

In requesting reconsideration, JGB contends that the listing of its own facility in the place of performance clause in fact did create a binding obligation to supply small business products, since clause I35 in the IFB prohibited performance of the work in a place other than the place named unless specifically approved by the contracting officer and required that any change be to another small business facility. Since its intent was clear from this and the other clauses, JGB continues, its certification that the supplies would not be manufactured by a small business was a correctable error. These arguments are without merit.

JGB's argument ignores the fact that it expressly certified in its bid that not all of the supplies to be furnished would be produced by a small business. Reiterating the second basis for our original decision, even if the representations in the other clauses indicated, as JGB claims, an intent by JGB to furnish supplies produced by a small business, the express certification to the contrary in the small business supply clause evidences a clear intent to supply goods not produced by small business. While JGB obviously would have us accept the former as evidencing its true intent, the point is that nothing in the bid itself shows this to be the case; either reading of the bid leaves an inconsistency unexplained on the face of the bid. The bid therefore was ambiguous as to whether items produced by a small business would be furnished under this small business set-aside and had to be rejected as nonresponsive. Correction of the small business product clause is not an alternative; as we stated in our original decision, a nonresponsive bid cannot be made responsive after bid opening.

In support of its arguments, JGB cites our decision, Stellar Industries, Inc., B-218287, May 30, 1985, 85-1 C.P.D. ¶ 616, holding that a small business bidder's Walsh-Healey certification that it is a manufacturer, together with the designation of the bidder's own facility as the place of performance, legally obligated the bidder to furnish supplies manufactured or produced by a domestic small business concern, even though the bidder failed to represent expressly whether or not the end products would be the products of domestic small business. We recently reversed this decision on reconsideration, however, on the ground that since the Walsh-Healey manufacturer designation does not prohibit subcontracting the manufacture of the supplies to a large business, a representation that the small business bidder is a manufacturer does not assure that the products will be produced by small business and thus is not equivalent to a certification that all supplies to be furnished will be manufactured or produced by a small business concern. Stellar Industries, Inc.--Request for Reconsideration, B-218287.2, Aug. 5, 1985, 64 Comp. Gen. \_\_\_, 85-2 C.P.D. ¶ \_\_\_. In any case, the circumstances in Stellar were distinguishable from those here. Unlike JGB, Stellar had not made any designation in the small business product clause. Consequently, Stellar's bid, unlike JGB's, was not contradictory, and thus ambiguous, on its face.

JGB thus has not shown that our decision was erroneous as a matter of fact or law. 4 C.F.R. § 21.12 (1985). The decision therefore is affirmed.

  
Harry R. Van Cleve  
General Counsel